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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 454

BOROUGH OF FORD CITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 31–48) is reported at 345 F. 2d 645. The opinion of the district court (Pet. App. 16–30) is reported at 213 F. Supp. 248.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1965. Petition for rehearing was denied on May 26, 1965. The petition for certiorari was filed on August 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly reversed the trial court on the ground that the latter had ap-

plied the wrong test in determining the location of the ordinary high water mark of a navigable stream.

2. Whether the United States must pay compensation under the Fifth Amendment for the inundation of a municipal sewer system located in a town bounded by a navigable stream resulting from raising the level of the stream to a point within the limits of the ordinary high water mark, and maintaining it at that elevation for extended periods.

STATUTES INVOLVED

Public Law 86-538, approved June 29, 1960, 74 Stat. 252, provides:

AN ACT

For the relief of the borough of Ford City, Pennsylvania

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding laches or any statute of limitations, jurisdiction is hereby conferred on the United States District Court for the Western District of Pennsylvania, to hear, determine, and render judgment on the claim of the borough of Ford City, Pennsylvania, for damage to its sewer system allegedly due to the construction by the Department of the Army of a lock and dam designated as lock and dam numbered 6, on the Allegheny River.

SEC. 2. Proceedings shall be instituted any time within 90 days after the date of the enactment of this Act.

STATEMENT

This case was instituted by the Borough of Ford City in Pennsylvania by the filing of a complaint on September 20, 1960, in the United States District Court for the Western District of Pennsylvania, pursuant to a special jurisdictional Act of Congress (P.L. 86–538, 74 Stat. 252, *supra*). The Act did not create an independent basis of recovery, but merely conferred jurisdiction on the district court to hear, determine and render judgment on the claim of Ford City for damage to its sewer system allegedly due to the construction of Lock and Dam No. 6 on the Allegheny River, notwithstanding laches or any statute of limitations.

The complaint alleged that the cause of action arose under the Fifth Amendment; that plaintiff owned and operated a sewer system which flowed into the Allegheny River at approximate elevation of 766 feet mean sea level USGS datum (hereafter m.s.l.); that in 1928 the United States, in improving navigation on the Allegheny River, constructed and put into operation Lock and Dam No. 6 about four miles below Ford City for the purpose of deepening the river channel for navigation; that the effect was to raise the elevation of the water opposite the City to a level of 770 feet m.s.l. for protracted periods; that as a consequence, the City had to increase the pumping capacity of its sewer system and to pump its sewage at more frequent intervals; and that, since the sewers were constructed with cement mortar joints, there was an escape of fine sand through the imperfect